Filed 3/17/09 In re M.F. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.F., a Person Coming Under the Juvenile Court Law.	B206020
THE PEOPLE, Plaintiff and Respondent, v. M.F., Defendant and Appellant.	(Los Angeles County Super. Ct. No. PJ41195)

APPEAL from an order of the Superior Court of Los Angeles County, Fred J. Fujioka, Judge. Affirmed as modified.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

M.F. appeals from an order of wardship pursuant to Welfare and Institutions Code section 602 following a finding that he committed two robberies of the second degree (Pen. Code, § 211). He was placed home on probation and a maximum period of confinement was set at five years. He contends there was insufficient evidence to support the finding of two robberies and that there was an error in "sentencing credits." For reasons stated in the opinion we modify the order of wardship by striking the maximum period of confinement and in all other respects affirm the order of wardship.

FACTUAL AND PROCEDURAL SUMMARY

On June 16, 2007, at approximately 4:20 p.m., Martha Rojas was at Branford Park in the County of Los Angeles with her husband Dario Novoa and his brother-in-law. Rojas was standing outside of the restroom and saw appellant, who was sitting on a bike, try to "bump" Novoa's brother-in-law. Rojas looked at appellant and said, "Why do you have to do that?" Appellant and Rojas talked and when Novoa exited the restroom he asked her "what happened?" Rojas said, "Let's just go. They're stupid." Appellant's companion, who also was on a bike, verbally confronted Novoa. Novoa never had a chance to respond because they all "rushed him." Appellant and approximately five other "kids" approached and "started beating on him." Everyone started hitting Novoa. Rojas tried to separate them and told appellant and his companions to "just leave. Leave him alone." Novoa fell to the ground and appellant and his companions continued to beat him. Appellant also hit Rojas as she was trying to push them away. Appellant and his companions kicked and hit Novoa while he was on the ground. When other members of Rojas's family approached, appellant and his companions ran away. The park director called the police.

After the fight, Rojas discovered Novoa's cell phone and clip were missing. Novoa always carried the phone on his belt with the clip and had been wearing the clip and phone before the fight started. Additionally, before the confrontation, Rojas had been holding her cell phone in her hand, and after the fight it was gone. She testified she dropped it and "they also took that." Using her sister's cell phone, Rojas called Novoa's cell phone and someone answered. Rojas asked the person to return the phone and the

person hung up on her. She called again and asked for the phone. The person who answered the phone started "cussing" and said, "Why do you have to call the police?" Rojas said, "What do you mean 'why do I have to call the police?' It was just you and five other people beating up on me and my husband." The person on the phone hung up on Rojas again. While Rojas spoke to him, he said, "Fuck you, bitch. Barrio Van Nuys" and then hung up. Rojas continued to call Novoa's cell phone. The phone was turned off and was not answered again after that day. Rojas continued to call her own phone every day, and finally someone answered it. She spoke to a girl and then to a man. Rojas said, "Do you know this is my phone? I would really appreciate it if you return my phone back to Branford Park." He said, "Yes, I will today. I found this one at the park." A man, thereafter, brought the phone to the park. Novoa's phone was never recovered.

Following appellant's arrest, he was taken to the police station where he was advised of and waived his *Miranda*[1] rights and was interviewed. The interview was tape recorded and the tape recording was played for the court.[2] Following a playing of the tape, Officer Charles Dinse acknowledged that when appellant was asked "who took their cell phones, . . . [appellant's] voice had reflection [*sic*] like it appeared to be that he was surprised to hear about cell phones."[3]

In sustaining the petition the court stated this "is not an I.D. case. The minor indicated he was present. He said he was the guy on the bike who got his bike bumped

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] It was stipulated that the tape need not be transcribed at the hearing as long as it remained part of the record and was maintained in the court file. Included in the clerk's transcript is a clerk's certificate re: missing documents wherein the clerk of the superior court certified that efforts to locate the transcript had been made and the transcript could not be found.

[3] Defense counsel argued about "the reflection [*sic*] of [appellant's] voice when he was questioned about the cell phone by the investigator. When the voice went up–'they took the cell phones? They took cell phones?'–The voice reflections [*sic*] were raised. I think that shows predominantly what he testified to here is that there's no awareness of any cell phones being taken."

twice, and then the fight started. The question isn't identity . . . . The question is whether or not it's been proven beyond a reasonable doubt as to what the minor did. [¶] The testimony of the victim in this case was clear, that after the altercation started, the minor was in the middle of it, and he was part of the group of five or six people that rushed him. Now, there was some–a lot of the cross-examination was on who did what. But it's natural in an altercation of this kind that a person who's involved in the middle of it can get struck and punched and kicked and not going to know who did what. All she's going to know is a bunch of people attacked me, and I was getting kicked and pummeled, but as far as dealing with the issues that I would consider in eyewitness I.D., number one, there's plenty of factors in there that would add to the eyewitness I.D. made by the woman in this case, but in addition to that, it really isn't an I.D. issue. [¶] The minor said he was there. The question again is whether or not the minor took part in this group of people that rushed her and whether or not he shared an intent to take the telephone. [¶] I'm finding it's been proven beyond a reasonable doubt in both instances. The woman–the wife was clear that the minor was part of the group that rushed her, and I believe that it's a natural and probable result that would occur that the property would be taken. This is the way groups terrorize people in the park. They beat them up and take things. It's not an issue of materialism. It's an issue of control and who is going to control an area. You create fear by beating people up. You create fear by committing crimes against them. You create fear by taking things. [¶] So I'm finding it's been proven beyond a reasonable doubt that the minor is guilty of the charges. The petition is sustained as to count 1 and count 2. I know you [appellant's counsel] characterize it as her putting it down, but she put it down because she's fighting these individuals. She put that telephone down as a result of the force that was directed against her. And it's clear that her husband had the telephone on his waist, on his hip, before it started and after the assault was ended, the telephone was gone. They searched around for it. They didn't find it."

DISCUSSION

I

Appellant contends there was "insufficient evidence to prove that either cell phone was stolen, let alone by appellant." He asserts the prosecution presented no evidence to connect appellant to either cell phone. He asserts not only was there no evidence that either cell phone was even stolen, but Rojas testified that her cell phone was returned by a man who claimed to have found it in a park. He also argues that there was no evidence of appellant's intent to permanently deprive Rojas or Novoa of their cell phones.

"'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials. [Citation.]' [Citation.] In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]' [Citations.]" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.) "This standard applies to cases based on circumstantial evidence. [Citation.]" (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

"'Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." [Citation.]' [Citations.]" (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

To prove a robbery, the prosecution must establish the defendant took property from the victim "by means of force or fear with the specific intent to permanently deprive him of that property." (*People v. Young* (2005) 34 Cal.4th 1149, 1176-1177; *People v. Lopez* (2003) 31 Cal.4th 1051, 1058; Pen. Code, § 211.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) "[A]n intent to permanently deprive someone of his or her property may be inferred when one unlawfully takes the property of another." (*People v. Morales* (1993) 19 Cal.App.4th 1383, 1391.)

"[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense[;] (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; accord, *People v. Williams* (2008) 43 Cal.4th 584, 637.) "Whether a person has aided and abetted in the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment. Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense. [Footnotes omitted.]" (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

"[T]he felonious intent required for conviction of robbery is the same as that required for larceny. [Citation.] It has long been recognized in the law of theft by larceny that '"the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use . . . ."' [Citations.] More particularly, 'Despite early suggestions that the taking must have been for the purpose of gain ("lucri causa"), it is settled both at common law and under modern statutes that the intent to deprive the owner permanently is enough, *even though the object of the taker is to destroy* rather than to appropriate the property to his own use.' (Italics added.) [Citations.]" (*People v. Green* (1980) 27 Cal.3d 1, 57.)

"'The generally accepted definition of immediate presence . . . is that "'[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.'"' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 507.) "[I]t is settled that a victim of robbery may be unconscious or even dead when the property is taken, so long as the defendant used force against the victim to take the property. [Citations.] There is no requirement that the victim be aware that his property is being taken from his presence by force or fear." (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330-1331.)

Here there was substantial evidence that appellant committed both robberies. There was circumstantial evidence appellant aided and abetted his companions and that one or more participants in the group attack took the cell phones. Appellant and the others beat Novoa and when Rojas tried to separate Novoa from his attackers, she too was hit. Following the struggle and after the attackers fled, the victims' cell phones were missing. "'[I]f the taking of property from the person of another is accomplished by force, although the victim does not know what is being done, it is, nevertheless, robbery.'" (*People v. Jackson*, *supra*, 128 Cal.App.4th 1326, 1331.)

II

Appellant contends the court erred in its calculation of predisposition credits. In a letter dated December 22, 2008, pursuant to Government Code section 68081, we asked the parties to address whether the court erred in declaring a maximum period of confinement since appellant was placed on probation, and if so, what effect that had on the court's statement of predisposition credits.

In response to our inquiry, the parties agree that the court erred in declaring a maximum period of confinement,[4] making any error in calculation of predisposition

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[4] Respondent argues that although it was error it has no legal significance and we need not modify the order.

credits moot. (See *In re Ali A.* (2006) 139 Cal.App.4th 569, 573; *In re Randy J.* (1994) 22 Cal.App.4th 1497, 1503-1504.)

DISPOSITION

The order of wardship is modified by striking the five-year maximum term of confinement, and in all other respects, the order of wardship is affirmed. The juvenile court is directed to correct the minute order of the disposition hearing accordingly.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.